**Internal Revenue Service**

# memorandum

TL-N-3003-88
CC:TL:TS/MKEYES

date: MAY 2 1988

to: District Counsel, Sacramento W:SAC
Attention: Jim Clark, Attorney

from: Director, Tax Litigation Division CC:TL

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subject: Issuance of Notice of Final Partnership Administrative Adjustment to Notice Partners.

This memorandum is in response to your request of January 28, 1988, regarding the issue of what statements and exhibits should be attached to FPAAs mailed to the notice partners by the Service Centers. Your memorandum raises two areas of concern with the procedures which are currently being used for sending FPAAs to notice partners. The first problem is the failure to provide all of the schedules and exhibits. This raises consistent settlement concerns, as incomplete settlements are made with notice partners. Secondly, you see a problem with "full and fair" notice to these partners regarding the basis of the adjustments being made.

CONCLUSION

We agree with your conclusion that the procedures for issuance of FPAAs need to be modified so that all Service Centers send notice partners complete FPAAs. This includes the schedule of adjustments, as well as any additional schedules or explanation of items. We would also agree that the RAR should not be attached to the copy of the FPAA being sent to notice partners, instead the appropriate explanation of adjustment language should be used. As you noted, the RAR is provided to the tax matters partner and should be made available to the notice partners by the TMP upon their request.

We have a scheduled a meeting with the Examination Division to discuss changing the procedures for issuing FPAAs to notice partners. Depending upon the results of the meeting, we may need to follow-up with a memorandum to the Commissioner recommending a change in procedures. Another recommendation which we will discuss with Examination, is to have the schedule of adjustments list the other adjustments to partnership items, such as

adjustments that do not necessarily affect the determination of partnership loss or income (i.e., tax credits, charitable contributions and sale of capital assets).

FACTS

In your memorandum you express concern with potential problems that can arise from the way FPAAs are being sent to notice partners. You describe the general procedures followed by Ogden Service Center, as well as the other Service Centers, in mailing copies of the FPAA to notice partners. You describe a specific instance where notice partners did not receive a complete listing of adjustments. One partner submitted a Form 870-P based upon the schedule of adjustments he received and which did not include an ITC disallowance. The settlement agreement was signed and accepted by the Service, even though it did not include the ITC issue. The error was not picked up until after the Service accepted the settlement agreement. It so happens that ITC issue was the most substantial partnership adjustment. The Service was in essence conceding the ITC issue by accepting the Form 870-P. The real problem was that the Service could have had to concede the ITC issue to other partners under the consistent settlement provisions of section 6224(c) (2). Fortunately, no other partner asked for such treatment within the 60 day time frame set out in Temporary Treas. Reg. § 301.6224(c)-3T(c)(3).

The general procedures being used in the Ogden Service Center (and it is your understanding, nationwide) when sending a FPAA to notice partner does not include sending all additional schedules and explanation of items. The Service Centers do send the form letter, the Form 870-P and the schedule of adjustments. Generally the schedule of adjustments attached to FPAA are designed to reflect adjustments to partnership income or loss. The problem occurs in that often there are substantial adjustments to partnership items which do not affect the computation of partnership income. Apparently some of the flow through items which are not used in calculating partnership income or loss are not included on the schedule of adjustments, so unless the complete FPAA is sent to notice partners they may believe the separate flow through items are being allowed.

DISCUSSION

Your first concern with the procedure that is currently being used is that it can result in settlements that are incomplete. We agree with your conclusion that procedures should be modified, so that which occurred in [redacted] partnership does not occur again. As you noted in your thorough memorandum on the subject, the consistent settlement problems that could have arisen in this situation

could have been a major problem for the Service. It is the Service's position that the Form 870-P is a binding settlement agreement which can not be revoked absent fraud, malfeasance or mistake of fact. There is no valid argument that can be made that there was no meeting of the minds, nor that any of the three conditions mentioned above existed. After all, the Service sent the schedule of adjustments, as well as reviewed the signed Form 870-P before it was executed by the Service and then accepted.

You also expressed concern that the measures being taken in light of what happened in [redacted] are not enough. In Ogden Service Center the schedule of adjustments are reviewed and compared to the revenue agents report and the notice sent to the TMP; hopefully reducing the instances where items of adjustments are missed. Your argument is that the failure to include adjustments on the original notice was not caught at the district level, it is likely that they will not be caught in the Service Center, as persons reviewing the FPAAs do not have experience as revenue agents or office auditors. Furthermore you feel that this procedure does not advise notice partners of the reasons why adjustments are made.

We are in agreement that the better procedure would be to include all additional schedules or explanation of items. The appropriate explanation of adjustment language should be used in place of attaching the revenue agent's report. Again if the Service Centers are concerned with administrative expediency, we would suggest that the schedule of adjustments also list other partnership adjustments that are reflected on the additional schedules. This can be generated at the Service Center.

Your second concern addresses the adequacy of the FPAA being sent to notice partners. You feel that it does not give the notice partners full and fair disclosure of the basis of the adjustments being made, nor does it meet the requirements set forth in the statute, the manual and the Tax Court Rules.

We agree that the FPAAs would be better if they included all additional schedules, but we do not agree that the notices have procedural due process problems. The Tax Court in Clovis I v. Commissioner, 88 T.C. No.53 (1987), stated that because of the similar functions of the FPAA and the statutory notice of deficiency, "the long established principles applicable to notice of deficiency should apply with equal force to a FPAA". The code does not prescribe any specific form or content for notices of deficiency. A notice which unequivocally advises a taxpayer that the Service intends to assess a deficiency against him is sufficient and a detailed explanation of how a deficiency was determined is not technically required See, e.g., Olsen v. Helvering, 88 F.2d 650,651 (2d Cir. 1937). There is a new twist imposed upon the sufficiency of a notice of deficiency by the Ninth Circuit. See Scar v. Commissioner, 814 F.2d 1363 (9th Cir.

1987). Prior to Scar the Service's act of issuing a facially proper notice of deficiency was considered to generally satisfy the statutory requirement of determining a deficiency. The Ninth Circuit imposed a "substantive content" requirement on determining a deficiency. A determination implies the Service has considered the items reported on the return, if a return was filed and a deficiency was calculated by reference to the taxpayers reported tax liability.

The situation you are addressing with incomplete FPAAs being sent to Notice partners is very different from Scar type issues. Futhermore a notice partner can get a complete copy of the FPAA from the TMP, along with the RAR giving an explanation of the adjustments. Although we prefer that a complete copy of the FPAA be sent to notice partners, we do not believe that the FPAA would be considered defective for purposes of full and fair notice, for the reasons mentioned above.

However, the effect on burden of proof is less certain. Where a notice partner petitions from the incomplete notice of FPAA and the respondent later seeks to raise the omitted adjustments as issues on answer (e.g., the ITC issue in [redacted]), the Court may consider it a new issue, shifting the burden of proof, despite its being raised in the FPAA issued to the TMP.

We will keep you advised as to the results of our meeting with Examination. Should you have any questions regarding this matter please contact Marsha Keyes at FTS 566-4174.

Marlene Gross

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